(3)

No. 00-1598

In the Supreme Court of the United States

CHARLES I. COVEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The government concedes that the ground on which the court of appeals rejected petitioner's Fifth Amendment claim is in direct conflict with this Court's recent decision in *United States v. Hubbell*, 530 U.S. 27 (2000). The court below held that the Fifth Amendment does not prohibit the use of documents produced under immunity in response to a grand jury subpoena; as the government concedes, "that proposition is not consistent with this Court's decision in *Hubbell*." Resp. Br. 5.

The government nonetheless argues that remand for reconsideration in light of *Hubbell* is not required, asserting that the result would be the same had the rule in *Hubbell* been applied. In support of this contention, the government relies upon a number of factual and legal propositions that

were not addressed by the court below. Those propositions are subject to considerable doubt. They should be resolved by the court below on remand.

1. The government contends that the "use immunity" that petitioner was promised in the grand jury "*did not encompass protection against derivative use*" of the documents he produced. Resp. Br. 7 (emphasis added). The government cites neither to record evidence nor legal authority for this proposition, and cites two cases from the court of appeals holding precisely the opposite. Resp. Br. 8 n.2 (citing *United States v. Kilroy*, 27 F.3d 679, 685 (D.C. Cir. 1994), and *United States v. Plummer*, 941 F.2d 799, 804-05 (9th Cir. 1991)). In *Kilroy*, for example, the court observed that subsequent to this Court's decision in *Kastigar v. United States*, 406 U.S. 441 (1972), "the term 'use immunity' has commonly been used to encompass the broader concept" of derivative use. *Kilroy*, 27 F.3d at 685. The court thus held that "nothing else appearing, an informal use immunity afforded by agreement . . . includes derivative use immunity equivalent to that afforded by the [immunity] statute." *Id.* In this case, the prosecutor told Mr. Covey that "what we granted you, in effect, was use immunity." C.A.App. 24. If there is any doubt that this promise encompasses derivative use immunity, it is a factual question that is more properly left to the court below.

2. The government also contends that petitioner had no Fifth Amendment privilege to withhold the subpoenaed documents in the first place. This position is, of course, completely at odds with the government's decision to promise petitioner use immunity. The government nonetheless asserts that the documents sought and produced under immunity were corporate documents, not personal ones, and that the privilege accordingly does not apply. Resp. Br. 5. The basis for the government's position is that the subpoena was directed to Charles Covey, custodian of

records for MCM Enterprises, his one-man corporation. But the subpoena was not limited to corporate records. Instead, it called for the production of "personal" records, as well as "business" records. Subpoena to Testify Before Grand Jury 2.[1]

The rider describing the documents required to be produced is entitled "Attachment to Subpoena, Charles Covey/MCM Enterprises." *Id.* The documents described are nowhere limited to MCM corporate records. Instead, the subpoena calls for production of "*personal* and/or business records" maintained on behalf of certain parties, and "*personal*, business, and/or cashier's checks." *Id.* (emphasis added). Thus, the government's assertion that only corporate documents are at issue is subject to considerable doubt. This, too, is a factual question that should be addressed in the first instance by the court below under the appropriate legal standards.

3. The government also claims that petitioner's immunity agreement "provided him no more than he was entitled to under *Braswell* [*v. United States*, 487 U.S. 99 (1988)]—that the government would make no evidentiary use of his 'individual act' of production against him." Resp. Br. 5. The government concedes that "under *Braswell*, the government could not have introduced into evidence that the subpoena was served on petitioner as custodian of records and that he produced the documents . . . ." Resp. Br. 6 (citing *Braswell*, 487 U.S. at 118). This point assumes that only corporate documents were produced; as we have already seen, this assumption is subject to doubt. Moreover, the goverment *did* introduce evidence that petitioner produced

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[1] The subpoena is among the materials lodged in connection with the government's brief.

the documents. At trial, the following testimony was elicited by the government on redirect examination of the case agent:

> Q. You went through the MCM records as Mr. Simon [petitioner's trial counsel] indicated to you. *You got them from Mr. Covey pursuant to subpoena.*
>
> A. *Yes.*

8/24/99 Tr. 319 (emphasis added).[2] Thus, even under the limited scope of immunity that the government contends was conferred, it would appear that petitioner's Fifth Amendment rights were violated.

4. Finally, the government argues that because petitioner failed to raise a Fifth Amendment objection in the trial court, the admission of documents he produced under immunity is reviewable only for plain error. The court of appeals did not, however, invoke the plain error rule as a barrier to reviewing petitioner's claim. Moreover, review of an argument raised for the first time on appeal is appropriate where "a previously ignored legal theory takes on new importance due to an intervening development in the law . . . ." *Salvation Army v. Department of Cmty. Affairs*, 919 F.2d 183, 196 (3d Cir. 1990). *Accord Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967) ("the mere failure to interpose such a [constitutional] defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground");

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[2] On cross-examination, petitioner's counsel had asked the agent whether a particular exhibit "was among the records given to you by Mr. Covey." 8/24/99 Tr. 282. Whether this question "opened the door" to the government's introduction of testimony that *all* of the records had been produced by petitioner is, of course, a factual question that will have to be addressed by the court below.

Holzsager v. Valley Hosp., 646 F.2d 792, 798 (2d Cir. 1989) (objections or defenses not waived where they were not known to be available at the time). *Hubbell* clearly and concededly constitutes a new development in the law as it relates to immunity in the context of an individual's production of documents. It was decided during the course of briefing in the court of appeals, and it was promptly brought to the attention of the court.

CONCLUSION

The court of appeals resolved petitioner's Fifth Amendment by relying on a legal proposition that was squarely refuted by this Court's recent decision in *Hubbell*. The case should therefore be remanded to the court of appeals for reconsideration in light of *Hubbell* and to address the alternate grounds for affirmance urged by the government in its opposition to certiorari.

Respectfully submitted,

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AUGUST 2001